**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**RSA No. 131 of 1994.**

**Date of decision: 16.12.2005.**

---

Tilak Raj ... Appellant

Versus

Smt. Jai Devi & Ors. … Respondents

---

*Coram :*

The Hon'ble Mr. Justice V.M. Jain, Judge.

Whether approved for reporting?[1]

For the appellant : Mr. Tarlok Chauhan vice Mr. Anand Sharma, Advocate.

For the respondents: Pt. Om Parkash, Advocate, for respondents No. 2 to 23, 25 and L.Rs of deceased respondent No. 24.

---

**V.M. Jain, J. :**

This Regular Second Appeal has been filed by defendant – appellant Tilak Raj against the judgments and decrees of the Courts below, whereby the suit filed by the plaintiffs was decreed by the trial Court and the appeal filed by Tilak Raj, defendant, was dismissed by the learned District Judge.

The facts which are relevant for the decision of the present appeal are that the plaintiffs had filed a suit for declaration with the allegations that they were the owners of the suit property, which was previously owned by their predecessor-in-interest, namely Hoshiar Singh. It was alleged that Hoshiar Singh had created usufruct mortgage of the

[1]Whether reporters of Local Papers may be allowed to see the judgment?

said property in favour of one Durga Dass and said Durga Dass had inducted defendants No. 1,7 and 8 and the predecessor-in-interest of defendants No. 2 to 6 in the said property as tenants. It was alleged that the plaintiffs had instituted a suit for possession by way of redemption of the suit property against the defendants and their predecessors-in-interest and the said suit was decreed, vide judgment and decree dated 5.6.1982 and in the appeal filed by the defendants in the said suit, a compromise was arrived at between the parties, copy Ext.P-1 and as per the said compromise dated 27.8.1983, the plaintiffs were to sell the suit property in favour of the defendants. (There were three sets of tenants). It was alleged that besides others, so far as defendant No.1 was concerned he was to get the ownership and possession of the property which was in his possession on payment of Rs.55,000/- to the plaintiffs. It was alleged that only that portion of the property was to be sold to the defendants, as per the said compromise, which was in their possession as tenants. It was further alleged that so far as defendant No.1 was concerned, he was tenant in possession of the shop comprised in Khasra No. 2422 and the ground floor of the shop comprised in Khasra No. 2428 under the mortgage. It was alleged that when the sale deed dated 23.7.1984 Ext.P-5 was executed by the plaintiffs in favour of defendant No.1, an error had taken place in the said sale deed and the entire property situated in Khasra Nos. 2422 and 2428 was sold in favour of defendant No.1, even though he was entitled to be sold only the ground floor of Khasra No. 2428, since the first floor of the shop situated in Khasra No.2428 was under the possession of Jagan Nath, predecessor-in-interest of defendants No. 2 to 6 and the said portion was to be sold in favour of Jagan Nath, as per the compromise Ext. P-1 and judgment dated

27.8.1983 passed by the Additional District Judge. It was alleged that said Jagan Nath had filed execution proceedings for the execution of the judgment and decree dated 27.8.1983 passed by the Additional District Judge. It was alleged that in view of the sale deed dated 23.7.1984 Ext.P-5, the execution of the said judgment and decree dated 27.8.1983 qua the share of Jagan Nath in Khasra No. 2428 was not possible. It was alleged that defendant No.1 had got mutation No. 104 sanctioned in his favour on 30.7.1984, on the basis of the aforesaid sale deed dated 23.7.1984 Ext. P-5. It was alleged that said mutation was also illegal and void and not binding on the plaintiff. Resultantly, the suit for declaration was filed.

The said suit was contested by defendant No.1 by filing written statement, taking up various preliminary objections including the plea of estoppel and limitation. On merits, defendant No.1 admitted the decree passed by the trial Court and also the appeal having been compromised before the learned Additional District Judge, vide compromise Ext. P-1 and in pursuance of the said compromise sale deed dated 23.7.1984 Ext.P-5 having been executed in his favour. However, it was alleged that the sale deed did not suffer from any error and there was no need to get the sale deed corrected. It was alleged that the plaintiffs were not entitled to any relief as the said sale deed was according to the compromise Ext.P-1 and the judgment and decree dated 27.8.1983 passed by the Additional District Judge, on the basis of the said compromise. It was further alleged that mutation was rightly sanctioned in favour of defendant No.1 on the basis of the aforesaid sale deed. Separate written statement was filed by defendants No. 2 to 6, alleging therein that they were entitled to the sale of the first floor of the

shop situated in Khasra No.2428, as per the said compromise, on the basis of their possession.

Replication to the written statement of defendant No.1 was filed. Various issues were framed, including the issues as to whether the suit was barred by limitation and the plaintiffs were estopped by their act and conduct from filing the present suit. Both the sides led evidence in support of the respective contentions. After hearing both sides and perusing the record, the learned trial Court decreed the suit of the plaintiffs and the sale of the first floor of the shop in Khasra No.2428 by the plaintiffs in favour of defendant No.1, vide sale deed Ext.P-5, was declared illegal and void and not binding on the plaintiffs and similarly, mutation No. 104 dated 30.7.1984, which was attested on the basis of the sale deed Ext.P-5, was also declared illegal and void. It was further ordered that as per the sale deed Ext.P-5, defendant No.1 had acquired the right of ownership and possession of the shop situated on Khasra No. 2422 and only the ground floor of the shop situated on Khasra No. 2428, whereas ownership of the first floor of the shop situated in Khasra No. 2428 remained intact with the plaintiffs and the plaintiffs were directed to execute a sale deed in respect of the first floor of the shop situated in Khasra No. 2428 in favour of defendants No. 2 to 6. While decreeing the suit of the plaintiffs, it was held by the learned trial Court that defendant No.1 had failed to show as to how the plaintiffs were estopped by their act and conduct to file the present suit. It was further held that the suit filed by the plaintiffs could not be said to be barred by limitation. Aggrieved against this judgment and decree of the trial Court, defendant No.1 filed appeal. The said appeal was dismissed by the learned District Judge, upholding the findings of the trial Court, on merits as also on the

question regarding limitation. Aggrieved against the same, defendant No.1 filed the present Regular Second Appeal in this Court.

Vide order dated 9.7.2004, the appeal was admitted to a regular hearing, on the following substantial questions of law:-

1. Whether the Courts below were right in holding the suit within limitation?

2. Whether the Courts below have wrongly held that the plaintiffs were not estopped from instituting the present suit by their act and conduct?

I have heard the learned counsel for the parties and have gone through the record carefully.

The learned counsel appearing for the defendant – appellant submitted before me that the Courts below had erred in law in holding that the suit was not barred by limitation. It was submitted that in fact the suit was clearly barred by limitation, inasmuch as, the sale deed was executed on 23.7.1984 and the present suit was filed in the year 1992. However, I find no force in this submission of the learned counsel for the defendant – appellant. Under Article 59 of the Limitation Act, 1963, the limitation for filing a suit for cancellation or setting aside of an instrument or decree or for rescission of a contract is three years from the date when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded, first became known to him. In the present case, the plaintiffs had filed the present suit for declaration for setting aside the sale deed dated 23.7.1984 Ext.P-5, executed by them in favour of defendant No.1, on the ground that in the said sale deed, the first floor of the shop situated on Khasra No. 2428 had illegally been added, since the sale deed was to be executed as per the

compromise Ext. P-1 and the judgment and decree dated 27.8.1983 passed by the Additional District Judge. In the suit, the plaintiffs had categorically pleaded that they came to know about the aforesaid mistake in the said sale deed only when Jagan Nath, the predecessor-in-interest of defendants No. 2 to 6, had filed the execution proceedings for the execution of the judgment and decree dated 27.8.1983 passed by the Additional District Judge, since the first floor of the shop on Khasra No. 2428 was to be sold to Jagan Nath, the predecessor-in-interest of defendants No. 2 to 6, as per the aforesaid compromise Ext.P-1 and the judgment and decree dated 27.8.1983 passed by the Additional District Judge. Thus, in my opinion, the limitation for filing the present suit for declaration would start from the date when these facts, entitling the plaintiffs to file the present suit, became known to the plaintiffs. The defendant – appellant has miserably failed to show as to on which date, the plaintiffs came to know about these facts, which entitled them to file the present suit. In the absence thereof, it could not be said that the present suit filed by the plaintiffs was barred by limitation. As would be clear from the issues framed in this case, the onus of Issue No.3, as to whether the suit was barred by limitation, was on defendant No.1. He having miserably failed to prove this issue, in my opinion, the Courts below were perfectly justified in deciding this issue against defendant No.1 and in favour of the plaintiffs. Merely because PW-1 Uttam Singh, plaintiff, during cross-examination, had stated that they had come to know about the mistake when Jagan Nath had filed the execution petition, in pursuance of the judgment and decree copies Exts.P-1 and P-2, in my opinion, it could not be said that the plaintiffs had come to know about the mistake more than three years prior to the filing of the suits. As

referred to above, no evidence whatsoever was led by defendant No.1 to show as to when the plaintiffs had come to know about the said mistake in the sale deed Ext.P-5 and in the absence thereof, in my opinion, it could not be said that the suit was barred by limitation. The authority **Ramti Devi (Smt) Vs. Union of India, (995) 1 Supreme Court Cases 198**, relied upon the by the learned counsel for the defendant – appellant, in my opinion, would have no application to the facts of the present case and on the basis of the said authority, it could not be said that the suit filed by the plaintiffs in the present case was barred by limitation. This is especially so, when in the reported case, during evidence, it was admitted by the plaintiff that she had knowledge of the execution and registration of the sale deed on 29.1.1947 and initially a suit was filed in 1959 but was got dismissed as withdrawn with liberty to file fresh suit and thereafter, the suit in question was filed on 30.7.1966. It was under those circumstances that it was held by the Hon'ble Supreme Court that the suit was beyond limitation.

In view of the detailed discussion above, I uphold the findings of the Courts below on Issue No.3 and decide the first substantial question of law, referred to above, against the defendant – appellant.

So far as the second substantial question of law regarding estoppel is concerned, no arguments were addressed before me by the learned counsel for the defendant – appellant in this regard. Hence, this substantial question is also decided against the defendant – appellant.

No other point has been urged before me in this appeal.

For the reasons recorded above, finding no merit in this appeal, the same is hereby dismissed.

In view of the dismissal of the main appeal, the stay order dated 22.4.1998 passed in **CMPs No. 190 of 1994** and **455 of 1995** shall stand vacated.

**( V.M. Jain ),**
**Judge**

**December 16, 2005**
**(BSS)**